MR23/01390: Invitation to comply with legal obligation to provide reasons - Refusal decision deemed to have been made by Dr Gordon de Brouwer on 17 November 2023

[redacted]

To gordon.debrouwer at apsc.gov.au

CC [redacted]

Date Monday, May 5th, 2025

Dear Dr de Brouwer

I refer to my email of 10 September 2024, which was copied to the Office of the Australian Information Commissioner.

My email was sent in response to your General Counsel's (Ms Melanie McIntyre) submissions in respect of IC review MR23/01390. At the time, I copied Ms McIntyre's supervisor, Dr Rachel Bacon, into my email. I have, again, copied Dr Bacon into this email so that I have a record of having drawn the substance of this issue to her attention.

As you know, you are, under the *Freedom of Information Act 1982* (Cth), taken to have, on 17 November 2023, personally refused access to the documents that I submitted a request for access to. You have, despite being under a continuing legal obligation to provide reasons in support of your deemed refusal decision, failed to provide reasons in support of your deemed decision.

On 10 September 2024, I provided detailed submissions to both the Australian Public Service Commission and the Office of the Australian Information Commissioner about your failure to provide me with cogent reasons for decisions, as well as the disappointing, fallacious and incoherent submissions that your General Counsel, Melanie McIntyre, made in respect of the substance of IC review MR23/01390.

I has been more than half a year since I drew my coherent submissions to your attention. I think, by any standard of reasonableness, you have had ample opportunity to consider those submissions with a view to providing me with your reasons for decision, in furtherance of your continuing legal obligation to do so.

As the head of a Commonwealth integrity agency, and as the primary mover of the Government's policy to ensure that the APS, and all public servants, execute their duties with integrity in everything they do (which is to say nothing of the Parliament's

legislative mandate in respect of public servants' integrity obligations), I invite you to lead by example and comply with your continuing legal obligation to provide me with reasons for decision in respect of my FOI application dated 17 October 2023 (yes - it has been more 18 months since I applied for documents under the *Freedom of Information Act 1982* (Cth), all the while stonewalled and denigrated by your legal officers).

I believe that the time has long since passed to bring a lawful end to this IC review; don't you?

Yours faithfully

foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

On Tuesday, September 10th, 2024, I wrote:

> To whom it may concern
>
> **A. Introduction**
>
> [1] This is an email about IC review **MR23/01390.**
>
> [2] In this email, I will set out my submissions in response to submissions made to the OAIC by Melanie McIntyre, General Counsel of the Australian Public Service Commission. Melanie McIntyre provided me with her submissions on 4 September 2024.
>
> [3] This email is broken down into 11 parts.
>
> [4] Part A sets out an introduction.
>
> [5] In part B, I set out the decision under review.
>
> [6] In part C, I set out the motivating reason for my access request.

[7] In part D, I set out the background relating to the recruitment of Susan O'Connor, who was, according to documents made available under freedom of information legislation, selected as the successful candidate to fill a Senior Executive Band 1 classified National Judicial Registrar role in the New South Wales District Registry of the Federal Court of Australia.

[8] In part E, I distil material facts from the documentary evidence to which access has been granted under freedom of information legislation.

[9] In part F, I set out the law in respect of engaging public servants on the basis of merit.

[10] In part G, I set out a number of reasonable assumptions based on the law and the evidence to which access has been granted under freedom of information legislation.

[11] In part H, I identify a number of freedom of information decisions made by officials in the Federal Court of Australia.

[12] In part I, I identify the contradictions in the decisions made by officials in the Federal Court of Australia and the statements contained in a report issued by an investigator in the Australian Public Service Commission about the existence of evidence upon which material facts were based in a public interest disclosure investigation.

[13] In part J, I identify what it is that Melanie McIntyre should has done as part of this IC review process and what she has actually done. I will draw attention to the fallacies of reasoning in her submissions as well as to abuses of process on the part of the General Counsel.

[14] In part K, I set out my concluding remarks.

[15] Throughout this email, I am going to rely on:

a) documentary evidence released under the *Freedom of Information Act 1982* (Cth) by

> authorised decision makers in the legal team in the Office of the Commonwealth Ombudsman; and
>
> b) decisions rendered under the *Freedom of Information Act 1982* (Cth) by authorised decision makers in the Federal Court of Australia.

B. The decision under review

[16] The decision under review is a decision to refuse access to documents. That access refusal decision is deemed, by statute, to have been made personally by Dr Gordon de Brouwer, the principal officer of the Australian Public Service Commission.

[17] The decision under review is not one made under section 24AA of the *Freedom of Information Act 1982* (Cth).

[18] Staff members in the OAIC should not misapprehend the decision under review. Nor should staff members assume that I have misapprehended the decision under review because I have also criticised Ms McIntyre's claims that dealing with my request would unreasonably divert the resources of the APSC.

C. What motivated my request?

[19] My request is motivated by a statement of materials fact contained in a report issued by Kate McMullan, an acting assistant commissioner in the Australian Public Service Commission, under section 51 of the *Public Interest Disclosure Act 2013* (Cth): SO 10.

[20] Specifically, at page 3 of SO 10, Kate McMullan stated (emphasis my own):

> Appointments of Ms O'Connor, Ms Gitsham and Mr Benter
>
> *Relevant Allegation*

> The relevant allegation is that Ms O'Connor [amongst others was] appointed to [an] SESB1 position without proper process.
>
> *Relevant Evidence*
>
> All three persons were applicants through advertised processes (see table). Ms O'Connor was appointed to an SESB1 position following [a] gazetted process … Materials provided by the FCA, including ***gazettal information*** and ***selection reports***, indicated that this was a ***process properly undertaken***, and the appointment properly made …
>
> *Findings*
>
> On the basis of the evidence and on the balance of probabilities, I find that this allegation is not substantiated.

[21] Clearly, Ms McMullan claims that the Federal Court of Australia provided materials to her in respect of the decision to recruit Susan O'Connor to fill a Senior Executive Band 1 classified National Judicial Registrar role in the Federal Court, and those materials included gazettal information and selection reports. Furthermore, Kate McMullan concluded that the gazettal information and selection report "indicated that this [recruitment] was a process properly undertaken."

D. Background

D1. Email from Sia Lagos to Judges and Registrars noting the decision to recruit Susan O'Connor

[22] On 2 November 2018, Sia Lagos, the then Principal Judicial Registrar and National Operations Registrar of the Federal Court of Australia, sent an email to the judges and registrars of the Court: SO 1.

[23] That email reads:

> Dear Judges and Registrars
>
> As you are aware, over the past few months we have been undertaking an extensive recruitment exercise to backfill a number of National Judicial Registrar positions and, as part of the extension of the National Court Framework to the work undertaken by registrars, establishing registrar resources to support judges nationally, including through greater availability to conduct mediations and specialist support on the area of migration.
>
> I would like to take this opportunity to congratulate Tim Luxton, Murray Belcher and Russell Trott, on their appointment to the National Judicial Registrar and District Registrar roles for the VIC, QLD and WA registries respectively, and Katie Stride on her appointment to the National Judicial Registrar – Native Title position.
>
> In addition, I would [like] to congratulate and welcome the following Registrars to the Court, who will be introduced to Judges and staff as part of their induction program …
>
> National Judicial Registrar – Susan O'Connor
>
> This position will be be primarily responsible for performing delegated judicial functions at a high level, including conducting complex mediations and case management locally and nationally, and supporting National Coordinating NPA judges with the management of [National Practice Areas]. Susan will be located in Sydney and commences with the Court on 19 November 2018. Susan was Principal at Griffith Hack Lawyers where she led and managed lawyers across Sydney, Melbourne, Brisbane and Perth. Susan has over 17 years' litigation experience and is an expert in intellectual property law and also has extensive litigation experience in consumer law, competition law and general commercial law.

[24] The recruitment of the Federal Court's National Judicial Registrars commenced after

the plenary meeting of judges in March 2018, where, according to a memorandum from Sia Lagos to the Court's registrars, the judges of the Federal Court supported and endorsed various proposals about the restructuring of the work of the Court's registrars: SO 2.

D2. Correspondence from Sia Lagos setting out details about the recruitment of registrars

[25] On 5 October 2018, Sia Lagos sent an email to, amongst others, Catherine Sullivan, to which email was attached a document setting out the details of the "successful candidates" in respect of registrar vacancies in the Federal Court of Australia. The attached document bears the title *Judicial Registrar Recruitment – Budget*: SO 3.

[26] According to the Judicial Registrar Recruitment document, Susan O'Connor was the "successful candidate" for a Senior Executive Band 1 classified National Judicial Registrar role in the state of New South Wales: SO 3, page 3.

[27] According to the Judicial Registrar Recruitment document, the Senior Executive Band 1 classified National Judicial Registrar role for which Susan O'Connor was selected as the "successful candidate" was not budgeted: SO 3, page 3.

[28] According to the Judicial Registrar Recruitment document, Susan O'Connor would be offered a salary of $230,000 per annum, with a car allowance of $22,000 per annum: SO 3, page 3. Ms O'Connor would also be offered a superannuation package worth $35,420 per annum: SO 3, page 3.

D3. Record of Susan O'Connor's contract of employment

[29] On 12 October 2018, Susan O'Connor was furnished with an offer of engagement into the Australian Pubic Service: SO 4.

[30] That offer of engagement set out the material terms of employment, and Susan O'Connor accepted the terms of that offer on 12 October 2018: SO 4, page 3.

[31] According to written contract:

a) Susan O'Connor would be employed by the Commonwealth to work in the Federal Court of Australia; and

b) Susan O'Connor would engage in her duties in Sydney, New South Wales; and

c) Susan O'Connor's job title was National Judicial Registrar; and

d) the National Judicial Registrar role Susan O'Connor was selected to fill as the "successful candidate" bore a Senior Executive Band 1 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

e) Susan O'Connor was to be allocated a classification of Senior Executive Band 1 for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth); and

f) the National Judicial Registrar role Susan O'Connor was selected to fill as the "successful candidate" was a full-time, ongoing position; and

g) Susan O'Connor would commence working as a Senior Executive Band 1 classified National Judicial Registrar from 19 November 2018.

E. Material facts

[32] A number of material facts may be distilled from the documents evidencing the background facts set out.

[33] First, immediately before Susan O'Connor commenced working as a National Judicial Registrar in the Federal Court of Australia, Susan O'Connor worked as a principal lawyer in a private law firm (Griffith Hack). In other words, Susan O'Connor was recruited into the Australian Public Service (the Federal Court of Australia) from outside the Australian Public Service.

[34] Second, according to Sia Lagos, Susan O'Connor was selected as the "successful candidate" to fill a Senior Executive Band 1 classified National Judicial Registrar vacancy in the Australian Public Service (the Federal Court of Australia).

[35] Third, Susan O'Connor was selected to fill an ongoing, full-time role in the Australian Public Service based in Sydney, New South Wales.

F. The law

F1. Introductory comments

[36] All references to statutory provisions are point in time references, which is to say that they are references to provisions that were in force at the time of the events in question (i.e. the circumstances surrounding the recruitment of Susan O'Connor into the Australian Public Service).

F2. The *Public Service Act 1999* (Cth)

[37] The APS Employment Principles provide that, amongst other things, the Australian Public Service is a career based service that:

> a) makes fair employment decisions with a fair system of review: *Public Service Act 1999* (Cth), s 10A(1)(a); and
>
> b) recognises that the usual basis for engagement is as an ongoing APS employee: *Public Service Act 1999* (Cth), s 10A(1)(b); and
>
> c) makes decisions relating to engagement and promotion that are based on merit: *Public Service Act 1999* (Cth), s 10A(1)(c); and

d) requires effective performance from each employee: *Public Service Act 1999* (Cth), s 10A(1)(d); and

e) provides workplaces that are free from discrimination, patronage and favouritism: *Public Service Act 1999* (Cth), s 10A(1)(f).

[38] Agency Heads must uphold and promote the APS Employment Principles: *Public Service Act 1999* (Cth), s 12.

[39] APS employees must at all times behave in a way that upholds the APS Employment Principles: *Public Service Act 1999* (Cth), s 13(11)(a).

[40] The Australian Public Service Commissioner may issue directions in writing in relation to any of the APS Employment Principles for the purpose of:

a) ensuring that the Australian Public Service incorporates and upholds the APS Employment Principles: *Public Service Act 1999* (Cth), s 11A(2)(a); and

b) determining, where necessary, the scope or application of the APS Employment Principles: *Public Service Act 1999* (Cth), s 11A(2)(b).

[41] At the relevant time (i.e. in 2018), the Australian Public Service Commissioner had issued directions for the purposes of subsection 11A(2) of the *Public Service Act 1999* (Cth), in the form the *Australian Public Service Commissioner's Directions 2016* (Cth).

F3. Decisions made on the basis of merit under the *Public Service Act 1999* (Cth)

[42] For the purposes of paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth), which provides that decisions made relating to engagement and promotion are based on merit, a decision relating to engagement or promotion is based on merit if, amongst other things:

a) all eligible members of the community were given a reasonable opportunity to

apply to perform the relevant duties: *Public Service Act 1999* (Cth), s 10A(2)(a); and

b) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process: *Public Service Act 1999* (Cth), s 10A(2)(b); and

c) the assessment is the primary consideration in making the decision: *Public Service Act 1999* (Cth), s 10A(2)(e).

F4. Decisions made on the basis of merit and the *Australian Public Service Commissioner's Directions 2016* (Cth)

[43] Part 3 of the *Australian Public Service Commissioner's Directions 2016* (Cth) pertains to recruitment and selection.

[44] An Agency Head upheld paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth), which provides that decisions made relating to engagement and promotion are based on merit, a decision relating to engagement or promotion is based on merit if, relevantly, the Agency Head ensured that the decision was based on a process that met Part 3, Subdivision B of the *Australian Public Service Commissioner's Directions 2016* (Cth).

[45] Part 3, Subdivision B of the *Australian Public Service Commissioner's Directions 2016* (Cth) pertains to merit based selection processes, and contains three sections – sections 19, 20 and 21.

[46] Section 19 pertains to merit based selection processes for engagement into the Australian Public Service, or promotions within the Australian Public Service.

[47] Section 20 pertains to the notification of vacancies in the Australian Public Service.

[48] Section 21 pertains to additional requirements for engagement or promotion decisions

relating to Senior Executive Service Employees.

F4.1 Section 19 of the *Australian Public Service Commissioner's Directions 2016* (Cth)

[49] A selection process meets the requirements of Part 3, Subdivision B of the *Australian Public Service Commissioner's Directions 2016* (Cth), which pertains to merit-based selection processes for engagement or promotion, if:

a) the aim and purpose of the selection process is determined in advance: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(a); and

b) information about the selection process is readily available to to applicants: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(b); and

c) the selection process is fairly applied in relation to each eligible applicant: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(c); and

d) the selection process is appropriately documented: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[50] Moreover, when making a selection decision using a merit-based selection process, merit is the primary consideration: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(2)(a).

F4.2 Section 20 of the *Australian Public Service Commissioner's Directions 2016* (Cth)

[51] A selection process for a decision to fill a vacancy meets the requirements of Part 3, Subdivision B of the *Australian Public Service Commissioner's Directions 2016* (Cth), which pertains to merit-based selection processes for engagement or promotion, only if:

a) the vacancy, or a similar vacancy, in the Agency was notified in the Public Service Gazette within a period of 12 months before the written decision to engage

or promote the successful applicant: *Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(a); and

b) the vacancy was notified as open to all eligible members of the community: *Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(b).

F4.3 Section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth)

[52] A selection process for a Senior Executive Service vacancy, like the Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor was, according to SO 3, engaged to fill as the "successful candidate", meets the requirements of Part 3, Subdivision B of the *Australian Public Service Commissioner's Directions 2016* (Cth), which pertains to merit-based selection processes for engagement or promotion, if:

a) the Australian Public Service Commissioner, or a representative of the Commissioner, was a full participant in the selection process: *Australian Public Service Commissioner's Directions 2016* (Cth), s 21(a); and

b) if the representative of the Australian Public Service Commissioner participated in the selection process, the representative certified that the selection process complied with the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth): *Australian Public Service Commissioner's Directions 2016* (Cth), s 21(b).

G. Reasonable assumptions based on the law and known material facts

[53] First, it is reasonable to assume that the Senior Executive Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to fill on a full-time, ongoing basis was notified in the Public Service Gazette.

[54] Susan O'Connor, a principal lawyer at Griffith Hack and, thus, somebody who was not employed by the Commonwealth, must have been notified, along with other members of the community, about the Senior Executive Band 1 classified National Judicial Registrar vacancy that she was selected to fill.

[55] Second, it is reasonable to assume that Susan O'Connor did, along with other members of the community, submit an application to fill the Senior Executive Band 1 classified National Judicial Registrar vacancy that she was selected to fill. After all, how could she have been selected to fill the vacancy, following a competitive selection process, if she did not apply to fill the relevant vacancy?

[56] Third, it is reasonable to assume that the selection committee convened to conduct the competitive selection process prepared a report of the selection process. After all, the selection process must be appropriately documented if it is to be a merit-based selection process.

[57] Fourth, it is reasonable to assume that the Australian Public Service Commissioner, or his representative, participated in the selection process to fill the Senior Executive Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected, as the "successful candidate", to fill.

[58] If the Australian Public Service Commissioner had a representative participate in the selection process, a certificate noting that the representative was a full participant in the process must have been issued. The certificate would also have noted that the selection process complied with the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth).

[59] There is cogent and persuasive evidence that the Australian Public Service Commissioner had a representative participate in the selection processes for many Senior Executive classified registrar vacancies in the Federal Court of Australia, and the Commissioner's representative was Kerryn Vine-Camp, First Assistant Commissioner in the Australian Public Service Commission: SO 5. That said, according to correspondence between an official in the APSC and another in the Federal Court, it does not appear that Ms Vine-Camp participated in the selection process to fill the Senior Executive Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected, as the "successful candidate", to fill: SO 5.

H. Decisions pertaining to Susan O'Connor's recruitment, issued under the *Freedom of Information Act 1982* (Cth), which demonstrate that the decision to select Susan O'Connor was not one based on a merit-based selection process

H1. Vacancy notification published in the Public Service Gazette for the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role Susan O'Connor was selected to fill

[60] In response to a request, under the *Freedom of Information Act 1982* (Cth), for access to "the vacancy notification for the SES Band 1 classified National Judicial Registrar vacancy, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit-based selection process", an authorised decision maker in the Federal Court of Australia, Ms Bernadette Henderson, refused to grant access to the vacancy notification because the "document cannot be found or does not exist": SO 6.

[61] It is practically impossible for any official in the Federal Court of Australian to claim that the "document cannot be found" because if a vacancy notification was actually published in the Public Service Gazette, the notification would be capable of being plucked from the pages of the Public Service Gazette, which is published online, and available to the world: https://www.apsjobs.gov.au/s/all-gazette-issues.

[62] The inference to be drawn is that "the vacancy notification for the SES Band 1 classified National Judicial Registrar vacancy, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit-based selection process" does not exist, and never has existed. But such a state of affairs would be contrary to the requirements set out in paragraphs 20(1)(a) and (b) of the *Australian Public Service Commissioner's Directions 2016* (Cth), and paragraph 10A(2)(a) of the *Public Service Act 1999* (Cth).

[63] In other words, paragraphs 20(1)(a) and (b) of the *Australian Public Service Commissioner's Directions 2016* (Cth), and paragraph 10A(2)(a) of the *Public Service Act 1999* (Cth) were contravened in respect of the decision to select Susan O'Connor as the "successful candidate" for the for the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role.

H2. Applications submitted to fill the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor was selected to fill as the "successful candidate"

[64] In response to a request, under the *Freedom of Information Act 1982* (Cth), for

access to “each and every application submitted for the Senior Executive Band 1 classified National Judicial Registrar vacancy based in Sydney, New South Wales (which vacancy Sia Lagos claimed, in her correspondence of 5 October 2018 to Catherine Sullivan, Susan O’Connor has been selected to fill as the ‘successful candidate’”, an authorised decision maker in the Federal Court of Australia, Ms Bernadette Henderson, refused to grant access to the vacancy notification because the “document cannot be found or does not exist”: SO 7.

[65] In other words, there is no record of a single application being submitted by any member of the Australian community to fill the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role that Susan O’Connor was selected to fill as the “successful candidate”. But that is contrary to the requirement set out in paragraphs 19(1)(c) and (d) of the *Australian Public Service Commissioner’s Directions 2016* (Cth), and paragraphs 10A(2)(b) and (e) of the *Public Service Act 1999* (Cth).

[66] Thus, paragraphs 19(1)(c) and (d) of the *Australian Public Service Commissioner’s Directions 2016* (Cth), and paragraphs 10A(2)(b) and (e) of the *Public Service Act 1999* (Cth) were contravened in respect of the decision to select Susan O’Connor as the “successful candidate” for the for the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role.

H3. Selection committee’s report in respect of the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role that Susan O’Connor was selected to fill as the “successful candidate”

[67] In response to a request, under the *Freedom of Information Act 1982* (Cth), for access to “the selection panel’s report for the Senior Executive Band 1 classified National Judicial Registrar vacancy based in Sydney, New South Wales (which Sia Lagos claimed, in her correspondence of 5 October 2018 to Catherine Sullivan, that Susan O’Connor was the ‘successful candidate’ for”, an authorised decision maker in the Federal Court of Australia, Registrar Rohan Muscat, refused to grant access to the vacancy notification because the “document cannot be found or does not exist”: SO 8.

[68] In other words, there is no record of the reasons of the selection committee that decided to select Susan O’Connor as the “successful candidate” to fill the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role.

[69] At the very least, paragraph 19(1)(d) of the *Australian Public Service Commissioner's Directions 2016* (Cth) was contravened, but, in the light of what has been noted in parts F1 and F2 of this email, it is quite clear that paragraph 19(1)(c) of the *Australian Public Service Commissioner's Directions 2016* (Cth) and paragraphs 10A(2)(b) and (e) of the *Public Service Act 1999* (Cth) were also contravened in respect of the decision to select Susan O'Connor as the "successful candidate" for the for the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role.

H4. Australian Public Service Commissioner's representative's certification of the selection process in respect of the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor was selected to fill as the "successful candidate"

[70] While it is logically possible that the Australian Public Service Commissioner personally participated in the selection process by which Susan O'Connor was selected to fill the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role in the Federal Court of Australia, the available evidence tends to militate against reaching this conclusion on the balance of probabilities: SO 5.

[71] In response to a request, under the *Freedom of Information Act 1982* (Cth), for access to "the certificate issued by the Australian Public Service Commissioner's representative (pursuant to section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth)) in respect of the merit-based selection process for the SES Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to fill", an authorised decision maker in the Federal Court of Australia, Ms Bernadette Henderson, refused to grant access to the vacancy notification because the "document cannot be found or does not exist": SO 9.

[72] On some level, Ms Henderson's response is unsurprising because the weight of evidence (even though the evidence is being mustered to prove a negative) tends overwhelmingly to support the conclusion that there was never a merit-based selection process in respect of the Senior Executive Band 1 classified National Judicial Registrar role in the Federal Court of Australia that Susan O'Connor was recruited to fill.

[73] Again, at the very least, paragraph 19(1)(d) of the *Australian Public Service Commissioner's Directions 2016* (Cth) was contravened, but, in the light of what has been noted in parts F1 and F2 of this email, it is quite clear that paragraph 19(1)(c) of the *Australian Public Service Commissioner's Directions 2016* (Cth) and paragraphs 10A(2)(b)

and (e) of the *Public Service Act 1999* (Cth) were also contravened in respect of the decision to select Susan O'Connor as the "successful candidate" for the for the full-time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role.

I. Material findings of fact made by Kate McMullan as part of her public interest disclosure "investigation"

I1. Kate McMullan's findings

[74] Kate McMullan set out her findings, in respect of the decision to recruit Susan O'Connor into the Senior Executive Band 1 classified National Judicial Registrar role basedin Sydney, New South Wales, in a report issued under section 51 of the *Public Interest Disclosure Act 2013* (Cth): SO 10.

[75] Specifically, at page 3 of SO 10, Kate McMullan stated (emphasis my own):

> Appointments of Ms O'Connor, Ms Gitsham and Mr Benter
>
> *Relevant Allegation*
>
> The relevant allegation is that Ms O'Connor [amongst others was] appointed to [an] SESB1 position without proper process.
>
> *Relevant Evidence*
>
> All three persons were applicants through advertised processes (see table). Ms O'Connor was appointed to an SESB1 position following [a] gazetted process … Materials provided by the FCA, including ***gazettal information*** and ***selection reports***, indicated that this was a ***process properly undertaken***, and the appointment properly made …

Findings

On the basis of the evidence and on the balance of probabilities, I find that this allegation is not substantiated.

I2. Material findings of fact to be based on logically probative and relevant evidence

[76] The person conducting a public interest disclosure investigation under the *Public Interest Disclosure Act 2013* (Cth) must ensure that:

a) findings of fact are based on logically probative evidence: *Public Interest Disclosure Standard 2013* (Cth), s 12(1).

b) evidence relied on in an investigation is relevant: *Public Interest Disclosure Standard 2013* (Cth), s 12(2).

I3. An assessment of Kate McMullan's findings on the basis of logically probative and relevant evidence

[77] Kate McMullan stated that the Federal Court of Australia provided materials, including ***gazettal information*** and ***selection reports***. The problem is that:

a) no vacancy notification for the Senior Executive Band 1 classified National Judicial Registrar vacancy was ever gazetted: see part F1 of this email; and

b) no selection report for the Senior Executive Band 1 classified National Judicial Registrar vacancy, which Susan O'Connor was selected to fill, exists: see part F3 of this email.

[78] In fact, nobody in the Australian community even applied for the Senior Executive Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to

fill.

[79] It follows that either:

a) Kate McMullan made up the existence of the documentary evidence (i.e. the ***gazettal information*** and ***selection reports***) upon which she based her materials findings; or

b) Kate McMullan did not rely on logically probative and relevant documents (i.e. ***gazettal information*** and ***selection reports*** that were not logically probative and relevant) when she made the material findings that the evidence "indicated" that the process by which Susan O'Connor was selection was properly undertaken.

[80] Whatever the case, the selection process by which Susan O'Connor was selected to fill the Senior Executive Band 1 classified National Judicial Registrar role based in Sydney, New South Wales, was not properly undertaken because, for reasons set out in this email, it is demonstrably the case that the process was not a merit-based selection process (as merit-based selection is defined by statute).

J. The requirements of this IC review

J1. Providing reasons for decisions

[81] Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency continues to have an obligation to provide a statement of reasons on the FOI request: FOI Guidelines, [3.161]. The obligation is a continuing one: FOI Guidelines, [3.161].

[82] Ms McIntyre must have regard to the FOI Guidelines: FOI Act, s 93A.

[83] Ms McIntyre's duty under this IC review is simple; she, or the principal officer or another authorised officer is obligated to provide a statement of reasons in respect of my access request.

[84] Despite almost a year passing since the deemed refusal decision came into effect, nobody at the Australian Public Service Commission has provided a statement of reasons in respect of my access request. The APSC's position is contrary to law.

J2. What the APSC's General Counsel has actually done in the intervening period

[85] Rather than provide me with a statement of reasons according to law, Ms McIntyre has used this IC review process as an opportunity to abuse statutory processes.

[86] In the submissions provided to the OAIC, nowhere does Ms McIntyre refer to her obligation to provide me with a statement of reasons in respect of my access request.

[87] Nowhere in her submissions does Ms McIntyre address how she proposes to comply with her obligation to provide me with a statement of reasons in respect of my access request.

[88] Nowhere in her submissions does Ms McIntyre even try to justify the so-called "substantive decision", which Ms McIntyre admits is merely a submission (see paragraph 2 of her submissions). In other words, Ms McIntyre does not even bother trying to justify her claim that it will take 69 hours to process my access request.

[89] Rather, Ms McIntyre uses the submissions as a platform for an appeal to pity. The appeal is as old as sin. Indeed, the ancients referred to such an appeal as the fallacy *ad misericordiam*. Instead of addressing the issue at hand, which is the deemed refusal decision and the continuing legal obligation to provide a statement of reasons in respect of my access request, Ms McIntyre has appealed to the Information Commissioner's sense of pity.

[90] Ms McIntyre gushes on about how how the distress being caused by the access request.

[91] Ms McIntyre also uses the submissions as a platform to advance some rather outlandish propositions.

[92] For example, Ms McIntyre claims that my request is not directed at obtaining documents from the APSC. As I have explained in these submissions, my access request is clearly about accessing documents pertaining to the recruitment of Susan O'Connor into the Australian Public Service, which documents Kate McMullan unequivocally stated were provided to her by the Federal Court of Australia as part of her public interest disclosure investigation. Ms McIntyre's claimed that my request is not directed at obtaining documents from the APSC is, thus, patently absurd.

[93] Another outlandish proposition is that I am responsible for abuses of process in applying for access to documents. This could not be further from the truth. I have demonstrated that my access request was made to access documents that Kate McMullan claims were provided to the APSC by the Federal Court.

[94] On the other hand, Melanie McIntyre is responsible for multiple abuses of process.

[95] First, Melanie McIntyre has advanced a false submission in respect of processing my request for access. As I have repeatedly explained, it will not take 69 hours to process a request for access to three discrete and accurately identified documents. I will not again repeat my reasons.

[96] Second, Melanie McIntyre has used this IC review process to advance a series of irrelevant submissions, some of which are actually personal smears.

[97] Third, Melanie McIntyre has failed to address the issues that are actually in dispute, the issues being the deemed refusal decision and the continuing obligation for somebody in the Australian Public Service Commission to furnish me with a set of reasons in respect of my access request.

[98] Fourth, Melanie McIntyre has not even attempted to justify her submission that it will take 69 hours to process my access request. In the light of the decisions that have been issued by the Federal Court this year, which I have referred to in this set of submissions, it seems to me quite clear that her failure to justify her submission that it will take 69 hours to process my access request is grounded in the fact that there are no documents within the scope of my request. Naturally, falsely claiming that it will take 69 hours to process my access request when there are no documents in respect of which a decision can be made is a blatant abuse of process.

[99] Fifth, Melanie McIntyre has extended this IC review unreasonably because she has failed to do what she is required to do by law - furnish me with a set of reasons in respect of my access request. That is an abuse of process.

[100] Melanie McIntyre has also spent time preparing irrelevant submissions, which are basically appeal to pity and personal smears, instead of preparing relevant submissions. She has wasted taxpayer resources.

K. Conclusion

K1. The issue

[101] The issue at hand is simple, which is a deemed refusal decision and the failure of an authorised officer in the APSC providing me with a statement of reasons in respect of my access request.

[102] Appeals to pity or personal smears have no part to play under the *Freedom of Information Act 1982* (Cth). The law guards jealously and zealously against such base fallacies, and competent officials who make decisions according to law are swift to dispatch such irrelevancies. The courts have not and will not tolerate decisions infected by unreasonableness / fundamental errors of reasoning (i.e. fallacies), and a diligent public servant will bring the concept of legality to bear on his or her decisions.

[103] Sadly, for all the verbiage, there is not even the faintest whiff of Melanie McIntyre addressing the issue in her submissions. Still more, her submissions are nothing other than irrelevancies and fallacies and personal smears, none of which are relevant to the decision under review.

K2. Recipients of this email

[104] I have copied Dr Gordon de Brouwer, Dr Rachel Bacon and Meeghan Webster, Dr de Brouwer's chief of staff, into this email.

[105] I have copied Dr De Brouwer because he is deemed to have personally made the decision refusing access to the documents I requested. Moreover, I do not want Dr de Brouwer to be able to say that he was unaware of my access request, the IC review process and his General Counsel's abuses of process.

[106] For similar reasons, I have also copied Dr Rachel Bacon, Melanie McIntyre's immediate supervisor.

K3. Acknowledging my email

[107] I ask that both the OAIC and the APSC acknowledge receipt of this email as soon as possible and, in any event, no later than 24 September 2024. If I do not receive acknowledgement of this email, I will be in touch.

K4. Learning from errors

[108] Dr Rachel Bacon recently gave a keynote address at the Public Sector Women in Leadership Summit 2024. In that address Dr Bacon noted that following the recent debacle that was Robodebt, earning public trust was of fundamental importance to the Australian Public Service. During that address Dr Bacon stated:

> Things go wrong all the time – we will all make mistakes or things happen that are out of our control. What I've learned is that how I respond to that is actually the thing that matters …

[109] I think Melanie McIntyre would do well not to take her cues from Annette Musolino, chief counsel at the Department of Human Services. Instead, Ms McIntyre should focus on Dr Bacon's message. Deception, fallacies and personal attacks are not what are called for when the paramount concern of the Australian Public Service is securing the public's trust after that trust was abused.

[110] Of course, I won't be holding my breath.

Yours faithfully

foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

On Wednesday, September 4th, 2024, FOI wrote:

OFFICIAL

Dear Applicant

Please find attached submissions, as provided to the OAIC on 5 July 2024.

Regards

Melanie McIntyre, General Counsel

From: foi-request-8834-ae113974.k48q6.22sp3@aleeas.com <foi-request-8834-ae113974.k48q6.22sp3@aleeas.com>
Sent: Tuesday, 18 June 2024 6:00 PM
To: FOI <FOI@apsc.gov.au>
Cc: OAIC - FOI DR <foidr@oaic.gov.au>
Subject: RE: MR23/01390 - Refusal decision deemed to have been made by Dr Gordon de Brouwer on 17 November 2023 [SEC=OFFICIAL]

Dear FOI

[1] Thank you for your email.

[2] You have noted that I am not satisfied that a practical refusal decision exists in respect of my FOI request. As I noted in my email of 20 November 2023, strictly speaking, the IC review application relates to a deemed refusal decision but I have

also pointed out how the reasons proffered by Melanie McIntyre are unreasonable and, in the light of the evidence, most probably contrived.

[3] You will recall that I requested the following documents:

1. the selection report of the selection committee that selected Susan O'Connor, in the course of a merit-based selection process, to fill the ongoing, full-time, Senior Executive Band 1 classified National Judicial Registrar role in Sydney for which she was allocated a Senior Executive Band 1 classification under rule 6 of the *Public Service Classification Rules 2000* (Cth); and
2. the certification, issued under section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth), by the Australian Public Service Commissioner's representative in respect of the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for; and
3. the application Susan O'Connor submitted to fill the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for.

[4] Sia Lagos, the current Chief Executive Officer of the Federal Court of Australia, sent an email to the judges and registrars of the Federal Court on 2 November 2018: https://archive.org/download/pid-2020-400006-2018-11-02-email-from-sia-lagos-to-judges-of-the-federal-court-a/PID-2020-400006%20-%202018%2011%2002%20-%20Email%20from%20Sia%20Lagos%20to%20Judges%20of%20the%20Federal%20Court%20about%20regi In that email, Sia Lagos noted that Susan O'Connor had been recruited to fill a National Judicial Registrar role in Sydney, having been recruited from outside the Australian Public Service.

[5] According to Ms Lagos' email to the judges, Susan O'Connor had been a principal at Griffith Hack Lawyers just prior to being recruited to fill the National Judicial Registrar role in Sydney.

[6] According to Ms Lagos' email to the judges, Susan O'Connor would commence in her role on 19 November 2018.

[7] According to a document attached to an email that Sia Lagos sent to Catherine Sullivan, amongst others, on 5 October 2018, Ms Lagos stated that Susan O'Connor was the "successful candidate" for an SES Band 1 classified National Judicial Registrar role based in NSW: https://archive.org/download/pid-2020-400006-october-2018-reconciliation-of-costs-against-budget-for-registra/PID-2020-400006%20-%20October%202018%20-%20Reconciliation%20of%20costs%20against%20budget%20for%20registrar%20roles%20in%20the%

[8] According to Ms Lagos' email to Ms Sullivan, Susan O'Connor would be provided with a base salary of $230,000 as well as benefits.

[9] Susan O'Connor was handed her contract of employment on 12 October 2018: https://archive.org/download/pid-2020-400006-2018-10-12-susan-o-connor-contract-of-engagement-as-senior-execu/PID-2020-400006%20-%202018%2010%2012%20-%20Susan%20O%27Connor%20-%20Contract%20of%20engagement%20as%20Senior%20Executive%20Band%201%20classified%20Natic

[10] According to her contract of employment, she would commence in a full time, ongoing, Senior Executive Band 1 classified National Judicial Registrar role in Sydney on 19 November 2018.

[11] In response to a freedom of information request for access to the "vacancy notification for the SES Band 1 classified National Judicial Registrar vacancy, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit based selection process", Bernadette Henderson, an authorised freedom of information decision maker in the Federal Court of Australia, refused to grant access to the vacancy notification because it does not exist or cannot be found: https://archive.org/download/pid-2020-400006-2023-04-20-federal-court-of-australia-ses-band-1-national-judici/PID-2020-400006%20-%202023%2004%2020%20-%20Federal%20Court%20of%20Australia%20-%20SES%20Band%201%20National%20Judicial%20Registrar%20vacancy%20notification%20for%20Su%20decision%29.pdf. That is, of course, most strange because a vacancy notice that was published in the Public Service Gazette can always be found - in the Public Service Gazette.

[12] In response to a freedom of information request for access to "the selection panel's report for the Senior Executive Band 1 classified National Judicial Registrar vacancy based in Sydney, New South Wales (which Sia Lagos claimed, in her correspondence of 5 October 2018 to Catherine Sullivan, that Susan O'Connor was the

'successful candidate' for", Rohan Muscat, an authorised freedom of information decision maker in the Federal Court of Australia, and a Registrar of the Federal Court, refused to grant access to the vacancy notification because it does not exist or cannot be found: https://archive.org/download/pid-2020-400006-2024-05-02-federal-court-of-australia-selection-report-for-ses-b/PID-2020-400006%20-%202024%2005%2002%20-%20Federal%20Court%20of%20Australia%20-%20Selection%20report%20for%20SES%20Band%201%20National%20Judicial%20Registrar%20vacanc%20decision%29.pdf. That is most strange because a selection process meets the requirements for merit based selection only if, amongst other essential requirements, the selection process is properly documented: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[13] In response to a freedom of information request for access to "the certificate issued by the Australian Public Service Commissioner's representative (pursuant to section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth)) in respect of the merit-based selection process for the SES Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to fill", Bernadette Henderson, an authorised freedom of information decision maker in the Federal Court of Australia, refused to grant access to the vacancy notification because it does not exist or cannot be found: https://archive.org/download/pid-2020-400006-2024-03-19-federal-court-of-australia-aps-commissioners-represen/PID-2020-400006%20-%202024%2003%2019%20-%20Federal%20Court%20of%20Australia%20-%20APS%20Commissioner%27s%20representative%27s%20certificate%20for%20SES%20Band%201%20N%20decision%29.pdf. That is most strange because a selection process meets the requirements for merit based selection only if, amongst other essential requirements, the selection process is properly documented: *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d). Part of that documentation extends to the certificate issued by the Australian Public Service Commissioner's representative under section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth).

[14] In response to a freedom of information request for access to "each and every application submitted for the Senior Executive Band 1 classified National Judicial Registrar vacancy based in Sydney, New South Wales (which Sia Lagos claimed, in her correspondence of 5 October 2018 to Catherine Sullivan, Susan O'Connor had been selected to fill as the 'successful candidate'", Bernadette Henderson, an authorised freedom of information decision maker in the Federal Court of Australia, refused to grant access to the vacancy notification because it does not exist or cannot be found: https://archive.org/download/pid-2020-400006-2024-06-03-federal-court-of-australia-applications-submitted-for/PID-2020-400006%20-%202024%2006%2003%20-%20Federal%20Court%20of%20Australia%20-%20Applications%20submitted%20for%20SES%20Band%201%20National%20Judicial%20Registrar%20

%20decision%29.pdf. Not a single application was submitted for a full-time, ongoing SES Band 1 vacancy in the Federal Court of Australia, yet a person from outside the APS managed to land a job for which there was neither public advertisement nor application submitted. Fancy that - a miracle.

[15] I find it hard to believe that it will take 69 hours to find 3 documents and provide a decision in respect of those documents, especially when the Federal Court of Australia's FOI decision makers have stated that the documents in question do not exist.

[16] Of course, Melanie McIntyre would not have lied to me. What kind self-respecting General Counsel, who takes her obligations under the Australian Government's General Counsel Charter seriously (which is to say nothing of the professional ethical obligations by which practitioners of the Supreme Courts of the States and Territories are bound) would abuse statutory processes for some kind of perverse advantage? As Dr de Brouwer has stated on many occasions, integrity is at the heart of everything the APSC does.

[17] No doubt Ms McIntyre will be able to persuade the OAIC that her "reasons" are not contrived. She is obligated to on IC review: *Freedom of Information Act 1982* (Cth), s 55D.

Yours faithfully

foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

On Wednesday, June 5th, 2024, FOI wrote:

> OFFICIAL
>
> Dear Applicant

We have been notified by the Office of the Australian Information Commissioner ('**OAIC**') that you have sought Information Commissioner review of the Australian Public Service Commission's ('**the Commission'**) primary decision dated 20 November 2023.

We understand that you have sought IC review of the Commission's primary decision because you are not satisfied that a practical refusal reason exists in relation to the processing of your request.

Noting the passage of time since the Commission made its decision, we are writing to engage with you on your application, in the hopes of resolving your concerns or at least narrowing the issues in dispute. To this end, we would be grateful if you could provide us with some further comments regarding why you disagree with the Commission's decision and any action you would like us to take in order to address your concerns. Should you be willing to revise the scope of your request to specific documents, it would be helpful if you could describe what documents you are now seeking access to.

We would appreciate if you could respond to us by **Tuesday, 18 June 2024** with any further submissions you wish to make. Please note, we will provide a copy of this correspondence and any response received from you to the OAIC to provide an update on our engagement with you.

Should you have any questions regarding this email, please contact us at foi@apsc.gov.au and quote reference number LEX 772.

Kind regards

FOI OFFICER

Legal Services

Australian Public Service Commission

Level 4, B Block, Treasury Building, Parkes Place West, PARKES ACT 2600
GPO Box 3176 CANBERRA ACT 2601

w: **www.apsc.gov.au**

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From: foi-request-8834-ae113974.k48q6.22sp3@aleeas.com <foi-request-8834-ae113974.k48q6.22sp3@aleeas.com>
Sent: Monday, 20 November 2023 8:24 PM
To: OAIC - FOI DR <foidr@oaic.gov.au>
Cc: de Brouwer, Gordon <Gordon.deBrouwer@apsc.gov.au>; Talbot, Jo <Jo.Talbot@apsc.gov.au>; FOI <FOI@apsc.gov.au>
Subject: MR23/01390 - Refusal decision deemed to have been made by Dr Gordon de Brouwer on 17 November 2023

Dear FOIDR

Reference: MR23/01390

[1] The purposes of this email are to draw your attention to:

a) a putative decision notice issued by Melanie McIntyre, Chief Counsel in the Australian Public Service Commission (**APSC**), in respect of an access application I submitted to the APSC on 17 October 2023; and

b) the glaring inconsistencies in her putative decision notice (**Attachment 1**) in relation to known facts.

A. IC review application

[2] On 18 November 2023, I applied for IC review.

[3] The IC review application was in respect of a deemed refusal decision on the part of the Australian Public Service Commissioner.

[4] As Ms McIntyre has noted in paragraph 1 of her putative record of decision (**Attachment 1**), on 17 October 2023, I applied to the APSC for access to certain documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

[5] As Ms McIntyre has noted in paragraph 4 of her putative record of decision (**Attachment 1**), on 13 November 2023, she furnished me with a request consultation notice pursuant to subsection 24AB(2) of the FOI Act (**Attachment 2**).

[6] As Ms McIntyre has noted in paragraph 5 of her putative record of decision (**Attachment 1**), on 13 November 2023, I provided my response to the request consultation notice in which I revised my access request.

[7] Subsection 24AB(8) of the FOI Act provides that the period starting on the day an applicant is given a notice under subsection 24AB(2) of the FOI Act and ending on the day that the applicant revises the request is to be disregarded in working out the 30 day period that requires an agency to notify an access applicant of an FOI decision in respect of a request.

[8] Since Ms McIntyre provided her request consultation notice on 13 November 2023 and I responded to that notice on 13 November 2023, 13 November 2023 is the only day to be disregarded in working out the 30 day period that requires an agency to notify an access applicant of an FOI decision in respect of a request.

[9] Since I made my access request on 17 October 2023, and 13 November 2023 was disregarded in working out the 30 day period that requires an agency to notify an access applicant of an FOI decision in respect of a request, a decision notice was due on 17 November 2023.

[10] I did not receive a decision notice in respect of my access request on 17 November 2023. A putative decision notice was provided to me by Ms McIntyre on 20 November 2023, three days after it was due.

[11] Since a decision notice was not provided to me on 17 November 2023, the FOI Act deems Dr Gordon de Brouwer, the principal officer of the APSC for the purposes of the FOI Act, to have *personally* refused to grant access to the documents I requested access to: FOI Act, s 15AC(3).

[12] I have copied Dr de Brouwer into this email so that he is aware that he is deemed to have, on 17 November 2023, *personally* refused access to the documents that I requested.

[13] Since a deemed refusal decision has been made, Ms McIntyre's putative practical refusal decision, by which she claims that the work involved in processing the request would substantially and unreasonably divert the resources of the APSC from its other operations, is not valid.

B. The reasons set out in Ms McIntyre's correspondence of 20 November 2023

[14] In her putative deemed refusal decision dated 20 November 2023, Ms McIntyre claims that the work involved in processing the request would substantially and unreasonably divert the resources of the APSC from its other operations and that, for that reason, a practical refusal reason exists.

[15] In order to claim that the work involved in processing the access request would substantially and unreasonably divert the resources of the APSC from its other operations, there must be a rational basis for that claim. Where there is no rational basis for that claim, a practical refusal decision will be set aside: *Fletcher and Prime Minister of Australia* [2013] AICmr 11.

[16] I applied for access to three documents – namely:

a) the selection report of the selection committee that selected Susan O'Connor, in the course of a merit-based selection process, to fill the ongoing, full-time, Senior Executive Band 1 classified National Judicial Registrar role in Sydney for which she was allocated a Senior Executive Band 1 classification under rule 6 of the *Public Service Classification Rules 2000* (Cth); and

b) the certification, issued under section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth), by the Australian Public Service Commissioner's representative in respect of the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for; and

c) the application Susan O'Connor submitted to fill the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for.

[17] Susan O'Connor was handed the role of National Judicial Registrar in Sydney on 12 October 2018 according to her contract of employment (**Attachment 3**).

[18] According to a reconciliation of costs against budget document prepared by Sia Lagos, and sent to Catherine Sullivan on 5 October 2018 (**Attachment 4**), Susan O'Connor was the "successful candidate" for a Senior Executive Band 1 classified National Judicial Registrar role in the New South Wales District Registry of the Federal Court of Australia.

[19] Susan O'Connor was selected to fill the Senior Executive Band 1 classified National Judicial Registrar role in the New South Wales District Registry of the Federal Court of Australia from outside the Australian Public Service (**Attachment 5**). Ms O'Connor was a principal at Griffith Hack (**Attachment 5**), a firm that specialises in intellectual property law.

[20] In response to a request for access to "the vacancy notification for the SES Band 1 classified National Judicial Registrar vacancy, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit-

based selection process", Bernadette Henderson of the Federal Court of Australia refused to grant access to the document because it did not exist (**Attachment 6**).

[21] How is it possible for a person who was selected from outside the Australian Public Service to have secured a role that wasn't notified to the Australian community?

[22] Well, it isn't. That is why, in response to a request for access to "the job application submitted for the National Judicial Registrar role that Susan O'Connor was selected to fill" (**Attachment 7**), Nicola Colbran, a Senior Executive Service employee and the most senior Federal Court registrar in South Australia, set aside Claire Hammerton Cole's FOI decision (**Attachment 8**) and, in its place, refused to provide access to "the job application submitted for the National Judicial Registrar role that Susan O'Connor was selected to fill" because the document does not exist (**Attachment 9**).

[23] In fact, in response to a request for access to "the selection committee's selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill" (**Attachment 7**), Nicola Colbran, a Senior Executive Service employee and the most senior Federal Court registrar in South Australia, set aside Claire Hammerton Cole's FOI decision (**Attachment 8**) and, in its place, refused to provide access to "the selection committee's selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill" because the document does not exist (**Attachment 9**).

[24] Ms Colbran also refused to provide access to "the Australian Public Service Commissioner's representative's certification in relation to the SES Band 1 National Judicial Registrar selection process that saw Ms Susan O'Connor selected as an ongoing, full-time SES Band 1 National Judicial Registrar" (**Attachment 7**) because there was no certification document (**Attachment 9**).

[25] Unsurprisingly, Ms Melanie McIntyre, a person who was recently promoted to the Senior Executive Service upon being selected as the Chief Counsel of the Australian Public Service Commission (**Attachment 10**), refused, in response to a request for "any and all documents that evidence, or tend to evidence, whether individually or collectively (i.e. in the light of one another), that 'materials provided by the FCA, including gazettal information and selection report, indicated that [the

selection process relating to Susan O'Connor] was a process properly undertaken, and the appointment properly made'", to provide the documents because the documents do not exist or cannot be found (**Attachment 11**).

[26] So it does beggar belief that the same Melanie McIntyre, Chief Counsel in the Commonwealth integrity agency, would insist that it will take 69 hours to process a freedom of information request for documents she has, herself, conceded do not exist. After all:

> a) the selection report of the selection committee that selected Susan O'Connor, in the course of a merit-based selection process, to fill the ongoing, full-time, Senior Executive Band 1 classified National Judicial Registrar role in Sydney for which she was allocated a Senior Executive Band 1 classification under rule 6 of the *Public Service Classification Rules 2000* (Cth); and
>
> b) the certification, issued under section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth), by the Australian Public Service Commissioner's representative in respect of the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for; and
>
> c) the application Susan O'Connor submitted to fill the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for,

are all documents "that evidence, or tend to evidence, whether individually or collectively (i.e. in the light of one another), that 'materials provided by the FCA, including gazettal information and selection report, indicated that [the selection process relating to Susan O'Connor] was a process properly undertaken, and the appointment properly made.'"

[27] The irony is that Ms McIntyre, a Senior Executive Service employee, claims that there is a practical refusal reason in respect of non-existent documents because the APSC "is currently working on a number of priority matters related to … the

Government's public service reform agenda, as recently announced by the Minister for the Public Service …"

[28] Senator Gallagher, the Minister for the Public Service, recently delivered her annual statement on APS reform: https://ministers.pmc.gov.au/gallagher/2023/annual-statement-aps-reform. In that statement she said:

> Around this time last year, I had the opportunity to deliver the fist speech, outlining our agenda for the reform of the APS. We placed trust and integrity at the centre of this agenda …
>
> [T]here are four pillars to which our reform agenda aligns. [The first is] [a]n APS that embodies integrity in all it does …
>
> [I]t is important to admit that there are areas that need to improve and areas where we need to implement further reforms to strengthen the APS.
>
> The Government recognises that Public Service has come under heavy scrutiny over the past 15 months, with the Robodebt Royal Commission, various Code of Conduct inquiries, audit reports, Ombudsman's inquiries, the PWC scandal and the associated focus on contracting across the APS.
>
> These reports and various recommendations show that there is more work to do to strengthen trust, integrity, independence and capability across the APS.

[29] On 17 November 2023, the very day that Dr Gordon de Brouwer is deemed, under the FOI Act, to have personally refused to provide access to the documents that I requested, the Department of Prime Minister & Cabinet published *Louder Than Words: An APS Integrity Action Plan* (**Attachment 12**).

[30] One of the opening passages of that report provides:

> Integrity is a broad concept. At its heart it is concerned with individual

> and institutional trustworthiness, and demands high ethical behaviour and ***respect for the law***. The Australian Public Service Commission (APSC) defines integrity as "doing the right thing at the right time" to "deliver the best outcomes for Australia sought by the government of the day". In practice it means out behaviour matches the APS Values and we are accountable when it does not.

[31] The publication of this report is, of course, all a public relations exercise. So far as the APSC is concerned, the ***real*** lesson from the Robodebt scandal and other scandals going to a lack of integrity in the Australian Public Service is that officials in the APSC must spin the kind of BS that the public wants to hear and, behind the scenes, lie, cheat, gaslight and abuse statutory processes so that the Australian Public Service is not cast in a bad light again. The foremost priority is to ensure that the APSC is not cast in a bad light, and what better way for a newly minted Senior Executive Service employee to do this than to abuse processes of the FOI Act (and claim that she does so in the name of Senator Gallagher and her APS reform agenda) to avoid all accountability for Kate McMullan's cover-up of systemic corruption in the Federal Court of Australia Statutory Agency.

[32] What's most concerning about Ms McIntyre's duplicity is that she is undermining productivity. By obstreperously setting up false practical refusal grounds in her reasons for decision, she is wasting her time writing lies in reasons for decision. That time she wastes on her lies is paid for by the Australian taxpayer. Every minute she spends lying is a minute that could have been put towards remedying the ills in the Australian Public Service, which Senator Gallagher referred to in her annual statement on APS reform.

[33] Moreover, every duplicitous decision Ms McIntyre renders ends up being brought to the attention of officials in the Office of the Australian Information Commission (**OAIC**), an agency that is already overburdened with work. Ms McIntyre, and liars like her, are responsible for diverting the resources of the OAIC away from other pressing work (like regulating the privacy space, investigating serious data breaches that cripple the national economy, handling genuine FOI request (i.e. FOI requests where there are genuine reasons to refuse access to documents, as opposed to made up practical refusal grounds that are deployed to frustrate scrutiny of substandard administrative decisions), and other worthwhile endeavours). In a country struggling with flagging productivity, stagnant wage growth and inflation, Ms McIntyre is using the scarce resources of the Australian taxpayer to waste the time and energies of public servants in other Commonwealth agencies and, thereby, contributing to the productivity malaise.

[34] At the end of the day, liars like Ms McIntyre cannot be permitted to succeed because they shatter faith in government, waste national resources, contravene the legal obligations and are rewarded for duplicity. That is all perverse. That is also why, as I have already stated in past correspondence to Ms McIntyre, I will not be perturbed by her contempt for legality. Ms McIntyre is not above the law; nobody is above the law. I ***will*** continue to make lawful access requests until Ms McIntyre comes to heel.

C. Document attached to this email

[35] Every single one of the documents attached to this email is available to download from the internet.

Yours faithfully

foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

------- Forwarded Message -------

From: FOI - FOI@apsc.gov.au

Date: On Monday, November 20th, 2023 at 12:10 PM

Subject: LEX 680 - Notice of Decision [SEC=OFFICIAL]
To: foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

OFFICIAL

Good afternoon,

Please find attached a notice of decision in relation to your recent freedom of information request.

Kind Regards,

FOI OFFICER

Legal Services

Australian Public Service Commission

Level 4, B Block, Treasury Building, Parkes Place West, PARKES ACT 2600
GPO Box 3176 CANBERRA ACT 2601

t: **02 6202 3813** w: **www.apsc.gov.au**

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68.45 KB 6 embedded images

Australian Government

Australian Public Service Commission

Anonymous

By email: foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

Our reference: LEX 680

Dear Applicant

Freedom of Information request

1. I am writing about your request dated **17 October 2023** for access to documents under the *Freedom of Information Act 1982* (FOI Act) held by the Australian Public Service Commission (Commission).

2. I am an authorised officer under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information (FOI) requests.

Your request

3. You requested access to documents in the following terms:

> *I am making this request for access to documents that may be in the control of the Australian Public Service Commission.*
>
> *If the documents are not in the control of the APSC, do not transfer this request to the agency that officials in the APSC believe has the documents. If the requested documents are not in the control of the APSC, please simply refuse access to the documents under section 24A of the FOI Act.*
>
> *As to my right to elect whether I would like the APSC to deal with this request and not transfer it to another agency, I refer you to the Federal Court of Australia's judgment in Bienstein v Attorney-General [2007] FCA 1174, [38]. The law on the matter is settled and clear.*
>
> A. *Under the Freedom of Information Act 1982 (Cth), I request access to the selection report of the selection committee that selected Susan O'Connor, in the course of a merit-based selection process (i.e. a process complying with, amongst other provisions, subsection 10A(2) of the Public Service Act 1999 (Cth)), to fill the ongoing, full-time, Senior Executive Band 1 classified National Judicial*

Registrar role in Sydney for which she was allocated a Senior Executive Band 1 classification under rule 6 of the Public Service Classification Rules 2000 (Cth).

B. *Under the Freedom of Information Act 1982 (Cth), I request access to the certification, issued under section 21 of the Australian Public Service Commissioner's Directions 2016 (Cth), by the Australian Public Service Commissioner's representative in respect of the Senior Executive Band 1 classified National Judicial Registrar "vacancy", which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for.*

C. *Under the Freedom of Information Act 1982 (Cth), I request access to the application Susan O'Connor submitted to fill the Senior Executive Band 1 classified National Judicial Registrar "vacancy" in Sydney, which Sia Lagos noted, in the reconciliation of costs against budget document, Susan O'Connor had been the "successful candidate" for.*

D. *Under the Freedom of Information Act 1982 (Cth), I request access to "[m]aterials provided by the FCA, including gazettal information and selection reports, [which] indicated that [the selection process by which Susan O'Connor was engaged as a Senior Executive Band 1 classified National Judicial Registrar in Sydney] was a process properly undertaken, and the appointment properly made."*

My decision

4. As I advised you on **13 November 2023**, I decided that a practical refusal reason existed for your FOI request under section 24AA of the FOI Act and initiated a 'request consultation process'. In that letter I requested you withdraw your request, revise it or tell us you do not wish to revise it.

5. You wrote to me on **13 November 2023**, where you provided submissions and agreed to re-scope parts of your request.

6. You narrowed down the scope of your request to only cover Parts A, B, and C.

7. In your response you made a submission stating:

I have read and considered your request consultation notice. I find it wholly unconvincing.

Even though I find your correspondence wholly unconvincing, I will revise my request so that it is limited to the documents requested in Parts A, B and C of my request of 17 October 2023. Specifically, I revise my request so that you need not consider the last request (Part D) that I made, namely "[m]aterials provided by the FCA, including gazettal information and selection reports, [which] indicated that [the selection process by which Susan O'Connor was engaged as a Senior Executive Band 1 classified National Judicial Registrar in Sydney] was a process properly undertaken, and the appointment properly made."

The other three parts of my request (Parts A, B and C) remain unrevised. Please process my request in the light of what is noted in this email.

You should have no trouble pulling the documents pertaining to Parts A, B and C from the PID investigation file prepared by Kate McMullan, assuming that they actually exist. I do not accept that it will take 25 hours to search for these documents, and a further 29 hours to identify and examine them.

8. I am writing to you now to advise that following a request consultation process, and notwithstanding the revision of your request, I am satisfied that a practical refusal decision still exists. I am therefore refusing your request under paragraph 24(1)(b) of the FOI Act.

9. In making this decision I have had regard to:
   - the terms of your request.
   - the terms of your submissions in response to the request consultation process.
   - the FOI Act; and
   - the FOI Guidelines issued by the Australian Information Commissioner.

10. I have not had regard to:
    - any reasons that you give for requesting access; or
    - the Commission's belief as to what your reasons are for requesting access; or
    - any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

Reasons

11. I am of the view that processing your request would be a substantial diversion of the Commission's resources because:
    - collecting and reviewing the volume of material involved would be significant as despite the revision to your request there is a substantive amount of documents that will be found, including attachments that have not been examined;
    - identifying, locating and/or collating documents would particularly be onerous as it is estimated that documents from multiple sources will be found that may be captured by the form the request takes;
    - many of these documents relate to previous FOI requests on related or similar matters.

12. I am also of the view that processing your request would be an unreasonable diversion of the Commission's resources because:
    - you have stated in your request that you do not wish for the request to be transferred. Given the nature of your request, relating to recruitment in the Federal Court, this is the agency most likely to hold the records you are seeking in your request, not the Commission;
    - while I note your submission questioning the time it would take to search and examine documents, as your request captures previous similar requests, including searches and correspondence, I am of the view that there would still be a substantial diversion of resources in continuing to process your request;
    - the Commission is a portfolio agency, with limited staffing resources available;

- the Commission does not have, nor has ever previously required, any permanent dedicated FOI staffing resources as it has historically received a low number of FOI requests that are capable of being managed within the existing resources;
- at present the Commission has received a higher than usual number of FOI Act requests; and applications for internal review. Many of the requests relate to similar or related matters and I have taken this into account in making my decision (subsection 24(2) FOI Act);
- the Commission has limited capacity to obtain temporary resourcing in considering the impact of processing your request; and
- the Commission is currently working on a number of priority matters related to its functions and the Government's public service reform agenda, as recently announced by the Minister for the Public Service the Hon Senator Katy Gallagher. Processing your request would unreasonably divert resources that would otherwise be dedicated to performing the essential operations of the agency.

13. The amount of time estimated to process your revised request is indicated below:

Search and retrieval	**Time required to undertake tasks**
Executing searches, examining relevant documents and collating documents	up to 20 hours
Decision making	
Identify and examine relevant documents	up to 23 hours
Redacting pages	up to 16 hours
Consult third parties	up to 4 hours
Writing statement of reasons	up to 2 hours
Compiling schedule of documents	up to 4 hours
Process Subtotal	up to 69 hours
Process Total (minus 'first 5 hours free')	up to 64 hours

Review rights

14. You are entitled to seek review of this decision. Your review rights are set out at **Attachment A.**

Contacts

15. If you require clarification on matters in this letter please contact the Commission's FOI Officer by email at foi@apsc.gov.au.

Yours sincerely

Melanie McIntyre
Authorised FOI decision maker
20 November 2023

ATTACHMENT A

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission; and/or

2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the agency authorised officer who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au

Post: The FOI Officer
Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply

in writing for a review by the Office of the Australian Information Commissioner (OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: **www.oaic.gov.au**

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au